extort various concessions from the distiller, this Illinois wholesaler threatens to or does sell one case of each of the distiller's brands several dollars below the ordinary case price. The predicament in which this maneuver would place the distiller is obvious. He could not sell the brand in New York for the month in question unless New York "related person" wholesalers file a price schedule containing the extortionate price charged by the Chicago wholesaler. Of course, the New York distiller to wholesaler price would have to be adjusted accordingly. The loss to the distiller in actual profits and in the good will of New York wholesalers would be enormous. All this because of the sale of one case by a reprehensible wholesaler.

Taken one step further, the one case sale at the unjustified lower price would place New York wholesalers in an intolerable position. If "related person" wholesalers chose the course of filing the Chicago wholesaler's case price for the brand rather than not selling it at all, non-related person New York wholesalers, otherwise free to sell at a price of their own choosing, would either be forced to meet this price or face the loss of sales to those selling at the lower price. Retailers would stockpile large orders at the lower per case price which would cause wholesalers and distillers irreparable loss even if the normal price were soon restored.

If "related person" wholesalers chose not to sell the brand at all during the period rather than sell at the cut price per case, non-related person wholesalers, free to sell at a price of their own choosing, could thus charge an "unjustifiably higher" price because of the freedom from competition with the "related person" wholesalers. In any event, they would have the entire New York market to themselves for at least a month. The "related person" wholesalers,

aside from being penalized the loss in sales, might permanently lose customers to the non-related person wholesalers. The statute thus gives any "related person" wholesaler anywhere in the country the power to blackmail appellant-distillers. This condition could also permit collusion between a distiller and an out of state wholesaler, with the result that the wholesaler could sell the brands of the distiller's competitor at prices so low as to prevent the competitor from being able to market his brands in New York. The collusive distiller would then enjoy a marked competitive advantage in New York for the period his competitor was faced with the dilemma of selling at a severe loss in New York or not selling at all and risking the loss of his New York market. That such a fantastic spectacle is without the bounds of reason can hardly be questioned.

There is another glaring defect in the requirement of Section 9 of Ch. 531 that "related person" wholesalers located in New York sell to New York retailers at a price no higher than the lowest sold by "related person" wholesalers elsewhere in the United States. The section makes no allowance for variances in wholesaler cost and profit margins, two figures that fluctuate widely throughout the United States because of such factors as differences in wages, local sales and gross receipts taxes, overhead and number of retail licensees serviced. Thus, New York wholesalers, who enjoy one of the lowest profit margins and endure one of the highest percentages of operating costs, see p. 15, *supra,* must offer New York retailers a price which may have been offered to retailers in other states by a wholesaler who enjoyed a much higher operating profit and a much lower percentage of net operating expense.

The gross inequity of this provision is patent, for New York wholesalers are at the mercy of those operating in other states who, of course, care nothing for the plight of New York wholesalers but are only concerned with competitive conditions in their own market. The obvious effect of such a provision will be that those New York wholesalers unable to exist by the standards prevailing in another market will be driven out of business. The bitter irony of this situation is apparent—a statute ostensibly devised to limit monopolistic practices and encourage free price competition will inevitably have the effect of reducing the number of wholesalers and establish a much more fertile field for monopoly operations. Such obvious unreasonableness should not be sanctioned by this Court.

In summary this Court must conclude that with present antitrust laws readily available to achieve the professed legislative goal without penalizing the innocent as well as those who may be guilty of anti-competitive practices in the future, Section 9 of Ch. 531 is patently arbitrary and unreasonable because it does not lead to a reasonable expectation of achieving the state's objective, and it forces "related person" New York wholesalers to price their merchandise in accordance with conditions prevailing in other markets.

C. Section 9 is Intolerably Vague.

It is well established that a legislative enactment requiring prospective action and imposing criminal penalties for failure to act correctly is violative of due process of law unless its terms are sufficiently clear for a man of reasonable intelligence to comply with them.

It cannot be overemphasized that a statute which makes criminal conduct otherwise lawful must, by its nature, "be

more definite than civil statutes." Note, *Due Process Requirements in Statutes,* 62 Harv. L. Rev. 77, 85 (1948); see *Winters* v. *New York,* 333 U. S. 507, 515 (1948).

As heretofore pointed out, what is now Section 101-b-3(f) of the ABC Law requires brand owners of liquor to file a verified affirmation that the price of wholesalers selling the brand owner's brands to New York retailers is no higher than the lowest price charged by "such brand owner . . . or any related person" to any retailer elsewhere in the United States. The definition of a "related person" includes any person

> . . . (2) the exclusive, principal or substantial business of which is the sale of a brand or brands of liquor purchased from such brand owner or wholesaler designated as agent . . . ABC Law, Section 101-b-3(d)(f).

The act and the regulations recently promulgated pursuant thereto by the State Liquor Authority have segregated those who sell liquor to New York retailers into the following categories.

If one is a brand owner or a person "related" to the brand owner, the price charged to New York retailers can be no higher than the lowest charged elsewhere in the United States by the brand owner or a non-New York "related person." The brand owner is charged with affirming and verifying this price to be no higher than the lowest charged elsewhere. See ABC Law, Section 101-b-3(f); Rule 16 of the State Liquor Authority, as amended.

If, however, a New York wholesaler is willing to affirm he is not "related" to the brand owner, he may then avail himself of the less rigorous requirements of Section 101-b-3(g). As interpreted by amended Rule 16 of the recent regulations, paragraph (g) requires a non-related person

wholesaler selling to New York retailers to affirm only that *his* prices to retailers in other states are no lower than those he has filed in his New York price schedule.

Patently, if one sells to New York retailers only he can charge any price he pleases, unlike his "related person" competitor, who has his maximum price determined as the lowest price charged by any other "related person" wholesaler elsewhere in the United States. If one does sell to retailers in another state and is not a "related person", he must file a New York price no higher than the lowest price *he* charges in any other state.

The obvious question is how does one ascertain exactly who is a "related person." The question is hardly academic to one charged at the risk of criminal and civil penalties and the loss of license with affirming that a "related person" elsewhere in the United States did not sell either to wholesalers or retailers, as the case may be, at a price lower than that contained in the price schedules of New York "related person" wholesalers for a particular month. Further, how can wholesalers know if they are related persons, interdicted from selling to their customers until the brand owner files his affirmation, or if they retain the traditional free enterprise right to sell at a price of their own choosing.

Appellants submit that there is no way of determining who these wholesalers are and that manufacturers charged with affirming that these wholesalers' prices are the lowest given elsewhere have no standard by which to avoid the criminal penalties of the act.

There are over 1,000 licensed wholesalers operating throughout the United States (R. 84). Of these some may do as much as 80 per cent of their business in the brands of

a particular brand owner (R. 193-94). From this high point, the percentage decreases to a very small level. These percentages are also representative in New York. At what stage in this spectrum is a brand owner safe in assuming that a particular wholesaler is a related person or a wholesaler in assuming he is not? Is it 40 per cent, 50 per cent, 20 per cent? And if a wholesaler only does 3 per cent of his business in the brands of a particular brand owner but that 3 per cent represents his profit margin, can one safely say that the wholesaler does not do a substantial part of his business in the brands of the brand owner concerned? It is assumed that "exclusive" means 100 per cent, but when it comes to determining what "principal or substantial" means one required to file an affidavit at the peril of up to six months in prison is not furnished with the constitutional guidelines required by the authority cited above.

An example of how small a percentage the word "substantial" may encompass in an antitrust context is given in the case of *Brown Shoe Company* v. *United States,* 370 U. S. 294, 327 (1962), an antitrust case in which it was found that a shoe manufacturer with less than 5 per cent of the market nevertheless had a sufficient share of that market to allow it "to substantially lessen" competition. See also *Standard Oil Co. of California* v. *United States,* 337 U. S. 293 (1949) (6.7% of the area market in question); *International Salt Co.* v. *United States,* 332 U. S. 392 (1947) ($500,000 volume considered substantial *per se*).

Since it is to a New York wholesaler's advantage not to be designated a "related person", there is every likelihood that brand owners, attempting to avoid criminal penalties by affirming the price schedules of many wholesalers, will come

into conflict with wholesalers who deny they are related. Such disharmony could well militate against the achievement of an orderly pattern of liquor distribution which it is the purpose of the ABC Law to encourage in seeking to achieve its overall goal of promoting temperance. See ABC Law, Section 101-b-1. But as the law now stands a wholesaler has no recourse to state authorities if a distiller should decide the wholesaler conducts a "substantial" part of his business in the brands of the distiller. The wholesaler's right to price freely can thus be abrogated by an act over which he has no control.

In sum, one is forced to grope in the dark and make arbitrary decisions as to which of his many purchasers is a statutory "related person." Should he guess wrong he may go to prison, his firm may lose its license and the wholesalers of New York, who have no hand in determining who is a related person, may nevertheless be prevented from selling the merchandise involved to New York retailers. It is difficult to imagine a more clear cut example of unconstitutional burdens arising from the vagueness of a statute.

POINT V

The no higher than the lowest price provisions of Section 9 of Chapter 531, 1964 New York Session Laws, deny appellants equal protection of the laws guaranteed by the Constitution of the United States.

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws."

The essence of this constitutional requirement is that all those similarly situated must be treated alike. That is,

legislation cannot constitutionally discriminate in its application between those in a group having definite attributes of identity. *Reynolds* v. *Sims,* 377 U. S. 533 (1964); *McGowan* v. *State of Maryland,* 366 U. S. 420 (1961).

With these guidelines in mind, it becomes necessary to examine Section 9 of Ch. 531 to ascertain if discrimination against members of the same general class has been effected. Wholesalers in New York who somehow are determined not to be "related persons" are unaffected by Section 9. See ABC Law, Section 101-b-3(g); State Liquor Authority, Rule 16, as amended. Insofar as the statute is concerned they can sell the same brands sold by "related person" wholesalers at any price they choose. Yet it has been seen that "related person" wholesalers will not be able to sell branded liquor until receiving an affirmation from the brand owner that the price schedule filed by the wholesaler lists a price no higher than the lowest at which the brand owner or wholesalers in other states who come within the definition of related persons sold the product in the immediately preceding month.

If the brand owner for any reason fails to file such an affirmation, the New York related person wholesaler is prevented from selling the brand for at least a month. ABC Law, Section 101-b-3(h). On the other hand the unrelated New York wholesaler will be able to sell that very brand at a price of his own choosing. These New York wholesalers will certainly enjoy a marked competitive advantage. As the cases clearly indicate, such discrimination between those having no marked distinguishing characteristics is prohibited by the equal protection clause.

In upholding the statute, the majority of the court below failed to discuss this example of prohibited legislative discrimination.

The treatment given to private brands by the legislation in question is another example of unconstitutional discrimination. Distilled spirits marketed as "private brands" owned by a New York retailer are not subject to the provisions of Section 9 of Ch. 531. Yet private brands in 1963 accounted for 12 per cent of New York's retail package store sales in stores handling private labels. These labels are sold in direct competition with nationally branded items. They often enjoy a competitive advantage as the brand-owner retailer, making a larger profit on his private brands, will often attempt to convince a consumer to select the private label in preference to a nationally marketed brand. No legislative determination to the effect that owners of private labels are less likely to charge unreasonably high prices as opposed to sellers of nationally branded distilled spirits exists. And yet brand owners of nationally branded liquors are forced to undergo added expense and face possible criminal penalties, in addition to risking the loss of their license, while those owning private label brands are exempt. It is this type of discrimination which is clearly prohibited by the equal protection clause of both the State and federal Constitutions.

In summary it is believed that there is no legitimate basis for discriminating against manufacturers and related person wholesalers of branded distilled spirits whose products are sold in the same retail outlets and in competition with private label brand liquors. It cannot be doubted that compliance with Section 9 of Ch. 531 will be a costly and burdensome process at best. To make manufacturers and "related person" wholesalers of branded distilled spirits risk their right to do business in New York and not impose the same conditions upon other wholesalers, or upon private

label owners is clearly an improper discrimination. It is the purpose of the equal protection clause to prevent just such discrimination.

POINT VI

Certain provisions of Section 7 of Chapter 531, 1964 New York Session Laws, also violate the federal constitution.

Section 7 of Ch. 531 would require brand owners to file schedules of their prices to wholesalers "irrespective of the place of sale or delivery." This new requirement can only mean that sales by brand owners to all wholesalers in every state must be filed with the State Liquor Authority.

The rationale for this provision is obvious; it will provide the Authority with an aid in policing the lowest price affirmations of Section 9 of Ch. 531. Regardless of purpose, the commerce clause of the federal constitution does not permit New York to require brand owners to file this information regarding their operations in other states. See *Florida Lime & Avocado Growers, Inc.* v. *Paul,* 373 U. S. 132, 154 (1963).

Section 7 also requires the basic price schedules to contain "the net bottle and case price paid by the seller." By its terms Section 7 applies to all brand owners of liquor, vintners of wine and wholesalers of both, but amended Rule 16 of the State Liquor Authority has confined its impact only to importers and wholesalers of distilled spirits by exempting vintners and distillers from the requirements of the express statutory terms.

It is submitted that not only does this discriminatory rule exceed the authority of the State Liquor Authority in

that it is an attempt to amend legislation rather than supplement it, see *Kasper* v. *O'Connell,* 38 Misc. 2d 3, 237 N. Y. S. 2d 722 (Sup. Ct. 1963); *Kaplan* v. *McGoldrick,* 198 Misc. 440, 100 N. Y. S. 2d 45 (Sup. Ct. 1950); *New York City Housing Auth.* v. *Knowles,* 200 Misc. 156, 103 N. Y. S. 2d 270 (Munic. Ct. 1951), but that there is no valid reason for requiring this information. The Legislature is concerned in Ch. 531 with the lowest price charged by manufacturers, importers and wholesalers to their customers, not with the cost of the goods to these sellers. Further, the difference beween the price paid by the seller and the price he charges his customer can be misleading, for there is no provision to reflect the seller's expenses which, as pointed out, leaves New York wholesalers with one of the lowest margins of profit among distilled spirits wholesalers in the United States. This requirement will erroneously convince one's customers that the seller is enjoying an inordinate profit and will lead to an unjustifiable call for still lower prices. Certainly no more capricious and constitutionally unreasonable act can be imagined than one having no relation even to the avowed legislative purpose.

CONCLUSION

This case raises questions of far-reaching social and economic importance, which can be answered only by resolving several acute issues of federal constitutional law, including:

1. Is a state statute which fails to promote temperance, but which fixes maximum prices for distilled spirits in one state at a price no higher than the lowest price charged in any other state and thereby levies a major economic

burden on the consumers of distilled spirits in other states, validated by the 21st Amendment to the Constitution of the United States?

2. Is not a state statute requiring distillers and wholesalers of alcoholic beverages to sell at a price no higher than the lowest price charged in any other state in conflict with the terms and policy of the Robinson-Patman and Sherman Antitrust Acts, and thus violative of the supremacy clause of the Constitution of the United States?

The judgment of the Court of Appeals of the State of New York should be reversed.

Respectfully submitted,

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